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IN THE

# Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL,
*Petitioners*,

v.

AMERICAN CIVIL LIBERTIES UNION, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF OF CALIFORNIA STATE SENATOR RAYMOND N. HAYNES, CAPITOL RESOURCE INSTITUTE, and CAMPAIGN FOR CALIFORNIA FAMILIES IN SUPPORT OF PETITIONER

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## INTERESTS OF *AMICUS CURIAE* [1]

California State Senator Raymond N. Haynes represents 800,000 Californians in the California Legislature. He was elected in 1994.

[1] This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amicus curiae* or its members, made a monetary contribution to the preparation or submission of this brief. Written consent to the filing of this brief had been granted by counsel for Petitioners and Respondents in this case. Such written consent of all parties has been lodged with the Clerk of this Court.

In 1996, Senator Haynes was elected by the Senate Republican Caucus to serve as Republican Whip. In that position, he is responsible for generating Republican analyses for the thousands of bills that reach the Senate Floor. He also serves as Chair of Constitutional Amendments Committee, Vice Chair of the Senate Judiciary Committee, Senate Health and Human Services Committee and the Public Employment and Retirement Committee, along with being a member of the Budget and Education Committees.

In 2000, Senator Haynes served as the National Chairman of the American Legislative Exchange Council (ALEC), a national bipartisan organization of over 2500 state legislators.

Capitol Resource Institute ("CRI") is a nonprofit organization that develops positive policies that affect culture and government in the State of California. CRI advocates on issues that affect California's families. They further provide a variety of services and products that educate the public on legislation and governmental policy. CRI provides commentary to more than 30 radio stations in California and offers expert analyses and commentary on key issues of public policy in the State of California.

Campaign for California Families ("CCF") is a nonprofit, nonpartisan family defense and lobbying organization serving families in the State of California and across the nation. CCF promotes the innate worth of all individuals, but advocates against behavioral choices that are detrimental to society, family and the general welfare of the individual states and the nation as a whole.

## SUMMARY OF ARGUMENT

One thing that our Nation should be certain of is that our schools, libraries, family residences and children's bedrooms were never intended to provide an open gateway to the same materials as might be offered at an adult bookstore or adult movie theater. Nor can it be reasonably surmised that our



Founders envisioned a situation whereby children could be easily lured through the First Amendment into the dark netherworlds of online pornography, instant images of bestiality, pedophilia, and other elements of, arguably, Man's darkest side. Quite properly, "[T]he State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men, [women], and citizens." *Ginsberg v. New York*, 390 U.S. 629, 640 (1968), citing, *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 at 165 (1944). See also, *Reno v. American Civil Liberties Union* 521, U.S. 844, at 869 (1997).

If adults and children are mutually given unfettered access to adult and obscene materials via the Internet, including Internet video, pictures and literature, a child's computer is essentially converted into an adult bookstore. The only difference is that an adult bookstore is subject to age-appropriate identification and appropriate zoning regulation. It only makes sense that the all access points (specific server sites, book and/or video stores, liquor stores, magazine racks, libraries, etc.) to harmful materials are *consistently* regulated for the protection of minors and the general public

To allow inconsistent regulation would be to engage in favoritism of the Internet to the exclusion of other speech media. Equal Protection would seemingly militate against any such form of public policy. Moreover, the First Amendment has been given its necessary breathing room since an Internet publisher can give free access to anything that is not harmful by the liberal standards set forth in *Miller v. California, infra.*

By conceptual analogy, it has already been held by this Court that a 'corporeal' community may outlaw home solicitation, of otherwise protected materials, in the interest of balancing the needs of residential privacy and a publisher's right to distribute information. *See, Breard v. Alexandria,*

341 U.S. 622 (1951). *See* also, *Frisby v. Shultz*, 484 U.S. 1003 (1988). In the present instance, Congress has clearly recognized that commercialized adult material in America's cyber-community can and does invade homes against the right of the parent to raise their child as they see fit. *See*, 47 U.S.C. 231 note (Supp.IV 1998) (Finding 1). *Also see*, *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. On Telecomm., Trade, and Commerce*, 105th Cong., 2nd Sess. (1998); S. Rep. No. 225, 105th Cong., 2nd Sess. 8 (1998); *Ginsberg*, 390 U.S. at 639. By enacting COPA, Congress has done no more than insure that a careful balancing act has been done per *Breard, Frisby* and *Miller v. California*, 413 U.S. 15 (1973). *See also*, H.R. Rep. No. 775, *supra* at 12 (1998); S.Rep. No. 225, *supra* at 2.

Indeed, protection of minors has already been held to be a *compelling* state interest. "This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). *See also*, *Reno v. ACLU*, supra at 869. Here, the issue is whether Congress has used narrow constitutional means to carry out this interest. As shown below, it can be concluded that Congress did use the most logical and narrow means of protecting children against harmful materials.

If one assumes that it is generally wrong to distribute obscene or harmful material to children, Respondents' position makes it clear that certain Internet participants do not want to be deemed capable of making socially responsible choices about the material that they make available to all Internet users, including children. Wrongly, the lower court has left one to assume that certain Web providers do not feel that the have the moral capacity to decide whether or not the material that they are distributing is violative of existing legal and community standards in American society.



Instead, the arguments espoused by Respondents seem to suggest that it is up to the state to completely define social responsibility for the Web provider. One is told that it is wrong to require that every Web publisher abide by the most restrictive and conservative state's community standards in order to avoid criminal liability. One is further expected to believe that, unless, the state can come up with a standard definition of what is "harmful" to children, by a community-based standard, that no legislation may be passed which might curtail the right of Web operators to disseminate whatever they wish. This laissez-faire attitude is adopted even at the risk of ruining the moral value of this Nation's children, the rights of parents to raise their children in a way befitting to moral integrity, and the Web provider's own freedom and responsibility to make moral judgments about what is right and wrong.

To further suggest that current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user is irresponsible. The Constitution recognizes that every participant in the marketplace of ideas can be held responsible for obscene, inciteful, or defamatory speech, regardless of whether or not the marketplace is in one geographical area state versus another. Cf., *Hamling v. United States*, 418 U.S. 87, 104-108 (1974). One speaks at his own peril if one chooses to engage in unprotected speech conduct or expression. Our Nation does not afford a 'right' to speak in an obscene way to children. As so eloquently stated by Abraham Lincoln, "One cannot have the right to do what is wrong." COPA simply reiterates this philosophical concern within the context of the Internet.

Reasonable minds can agree that children need not be exposed to harmful materials, regardless of geographical limits or a self-proclaimed inability to protect children. *See*, H.R. Rep. No. 775, *supra* at 13, 27-28. Indeed, Congress represents the voice of all local communities and government

by representation seemingly confers the right to bring decency standards to a national level. When Respondents question the integrity of COPA, they *a priori* question the collective findings and reasonableness of millions of Americans.

Finally, it is no substantial burden on Free Speech that one be prevented from doing or promoting what may be illegal in the first place. *See*, *New York v. Ferber*, 458 U.S. 747 (1982), *Osborne v. Ohio*, 495 U.S. 103 (1990) [re child pornography]. *Also see*, *United States v. Reidel*, 402 U.S. 351 (1971) [re mailing of obscene matter per 18 U.S.C. § 1461]. In sum, it is well within Congress' rights to determine that adult content is harmful to the morality of minors and to regulate accordingly. *Ginsberg v. New York*, 390 U.S. 629 (1968).

## I. COPA IS CONSISTENT WITH CONGRESS' RIGHT TO PROTECT CHILDREN AND DOES NOT VIOLATE THE FIRST AMENDMENT

This case does not present with any violation of fundamental rights. The First Amendment is a manifestation of the inherent right of Man to seek truth. It is premised on the notion that, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good is better reached by the free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out." *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (1919).

Indeed, "A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be



legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it." . . . [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment." *Young v. American Mini Theaters*, 427 U.S. 50, at 63-64 (1976).

Importantly, this Court has never stated that there is a First Amendment right to distribute harmful, 'adult', or obscene material to children or to make sure that children have free access to such materials. *Ginsberg*, *supra*. Moreover, there is no right to distribute information, electronic or otherwise, in a way that a government agency believes to be in violation of time, place and manner restrictions. *City of Renton v. Playtime Theaters*, *infra*. Whilst it may be true that the First Amendment graciously affords rights to peaceful assembly and to express oneself through 'adult' messages, there is no tenable claim for First Amendment protection in the conduct of viewing of others engaged in sexual activity, on videotape or via Internet, in or by way of a commercial setting. Cf., *Paris Adult Theatre I v. Slaton*, 413 U.S. 41 (1973). Here, Congress has actually limited its reach to commercial settings and has fully respected the rights of private citizens to possess and distribute materials amongst themselves. 47 U.S.C. § 231(a)(1) (Supp. IV 1998).

This Court has recognized that materials which appeal only to prurient interests may already exist at the outer fringes of the First Amendment. Indeed, it would seem inconsistent to give any greater protection to obscene or other harmful materials on the Internet. In *American Mini Theaters*, *Id.* at 61, Justice Stevens, writing for a plurality of this Court, stated that, "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the

free dissemination of ideas of social and political significance . . . " Further, "[t]he States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger public safety, or to jeopardize the States right to maintain a decent society." *Paris Adult Theatre*, 413 U.S. 49 at 68.

As further recognized in *American Mini Theaters*, *Id.* at 63, "[A]part from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of the material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment." Adult Web site providers should not be treated differently than adult movie theaters. While it is true that there is a private right to view and possess 'adult' materials, it is not true that one can engage in such conduct wherever, however and whenever one sees fit. *See generally*; *Stanley v. Georgia*, 394 U.S. 557 (1969). Conversely, it only makes sense that a purveyor of 'adult' materials may not distribute them in any way that they see fit. *See*, *United States v. Thirty-Seven Photographs*, *infra*. As a matter of common sense, it seems incongruent to suggest that the individual physical elements of cyber-space cannot be regulated. Behind every Web post there is an identifiable site and a human operator responsible for having posted the material.

Implicit in the above analyses is the Constitutional inference that a State need not prove to a jury that every act of commercial distribution and exhibition of pornographic materials is offensive to the First Amendment. In fact, in assessing potentially "obscene" materials, this Court found that it was not "error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. [cites]." *Paris* at 56. Indeed, the power to make a neutral judgment regarding the time, place and manner in which such materials



can be placed on exhibit is well within the province of the Courts. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986).

Under COPA, the daily responsibility for handling such materials resides with those who produce and distribute such materials. In fact, under 47 U.S.C. § 231(c)(1)(C), the producer can completely avoid community standards by doing no more than using "reasonable measures that are feasible under available technology." This reflects the very zenith of First Amendment protections and constitutes a hands-off approach by the State which protects children at the same time. Nevertheless, Respondents are claiming foul because the government does not have 'enough evidence' to support its *optional* requirement of digital certificates, credit card information, or debit account information as a means of controlling access to harmful materials.

Respondents' position overlooks the fact that, where a State's determination as to harmful effects relies on "various unprovable assumptions," there is no offense to the Constitution. "Such assumptions underlie much lawful state regulation of commercial and business affairs [cites]." *Paris* at 61-62. Here, unprovable assumptions about the exact methodology by which a provider might guard against children's access should not prevent enforcement of COPA.

As a matter of the people's rights, it is already established that there is an "interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris* at 58. Indeed, there is a "right of the Nation and of the States to maintain a decent society . . . " *Id.* at 59, citing *Jacobellis v. Ohio*, 378 U.S. 184, 199 (Warren, dissenting opinion) (1964). Accordingly, "[i]t is not for [this Court] to resolve empirical uncertainties underlying [ . . . ] legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself."

*Paris* at 60, *citing*, *Ginsberg v. New York*, 390 U.S. 629, 642-643 (1968).

Prior to *Renton*, this Court stated that, "The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Succinctly stated, nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Paris Adult Theater I* at 49, 63.

## II. BEING THAT THE INTERNET IS A MIRROR OF THE CORPOREAL MARKETPLACE OF IDEAS, IT SHOULD BE SUBJECT TO REGULATIONS SIMILAR TO THOSE IMPOSED ON OTHER MARKETPLACE PARTICIPANTS

"The information available on the Internet is "as diverse as human thought."" *American Libraries Association v. Pataki*, 969 F. Supp. 160, 164 (1996), citing *ACLU v. Reno I*, 929 F.Supp. 824 (E.D.Pa. 1996). Indeed, its "[c]ontent ranges from academic writings, to art, to humor, to literature, to medical information, to music, to news, to sexually oriented material." *Cyberspace Communications, Inc., v. Engler*, 55 F.Supp.2d 737 (E.D.Mich. 1999), citing *Pataki* at 164. As in the non-Internet world, at least some of the aforementioned material could rise to the level of being 'obscene.' "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Id.* at 746, citing *Kois v. Washington*, 408 U.S. 229 (1972).

Again, by analogy, in *Acara v. Cloud Books*, 478 U.S. 697 (1986), this Court held that a bookstore could be lawfully closed down where illegal activity was taking place at the site



(i.e. prostitution). While no obscenity charge was made by the prosecution, it was properly held that the First Amendment did not bar the closure. At most this was an incidental burden on Free Speech rights. Here the only burden placed upon Respondents is that they use the "reasonable" technological means to prevent violations of law. If there are no such means under 47 U.S.C. § 231(c)(1)(C), then one can only assume that Respondents would be able to show the same to a jury and be absolved of any liability under COPA.

In *United States v. Reidel*, 402 U.S. 351 (1971), this Court held that the mailing of obscene materials could be lawfully prohibited. While it was true that *Stanley v. Georgia*, 394 U.S. 557 (1969) may have given citizens a right to privately possess "obscene" materials, *Stanley* did not confer a right to distribute or sell obscene materials. The same can be said here since adults may have the right to possess certain Internet materials. However, the same right cannot be *always* extended to minors. *See*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 at 212, citing *Ginsberg*, *supra*.

To further support the position of *Amici Curiae*, this Court, in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), held that the private right to possess obscene materials could not be extended to the commercial importation of such materials. Of importance here, it was held that the right of a possessor "does not extend to one who is seeking . . . to distribute obscene materials to the public, nor does it extend to one seeking to import obscene materials from abroad, whether for private use or public distribution." *Id.* at 376. In accord, *United States v. 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973) [as to importation for exclusively private use]. By analogy, it only makes sense that Congress has the right and obligation to legislate against minors' importation of harmful materials from a provider's Web site. In the view of *Amici Curiae*, the best way to limit

importation of a commodity is by eliminating its supply and source (i.e. the individual Web information provider).

Lastly, in *United States v. Orito,* 413 U.S. 139 (1973), this Court held that 18 U.S.C. § 1462 did not violate the First Amendment when applied to the interstate transportation of obscene materials by a common carrier. Of high importance to the instant matter, it was stated that "[W]e cannot say that the Constitution forbids comprehensive regulation of interstate transportation of obscene material simply because such transport may be by private carriage, or because material is intended for the private use of the transporter . . . Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of the transporter's professed intent." *Id.* at 143. Since the Internet does not recognize state lines, *ACLU v. Reno III*, 217 F.3d 162, 168 (2000), it seems consistent with *Orito* that this Court should conclude that the private electronic transmission of harmful materials is no different than 'corporeal' means of transporting the same substantive materials.

In short, the restrictions imposed by COPA have only an incidental impact on free speech as no protected material is specifically banned. COPA, in exclusively addressing the *manner* in which the Web site operator conducts business, is narrowly tailored. Since it can already be illegal to commercially provide or distribute obscene or pornographic materials to minors, it is of no concern that a provider be limited from doing what they may have no right to do in the first place.



## III. GIVEN THE NATURE OF THE INTERNET, CONGRESS USED THE MOST NARROWLY TAILORED MEANS AVAILABLE TO LIMIT MINORS' ACCESS TO HARMFUL MATERIALS

This Court has stated that, "Sexual expression which is indecent but not obscene is protected by the First Amendment; and the federal parties do not submit that the sale of such materials to adults could be criminalized solely because they are indecent. The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards. *Ginsberg v. New York*, 390 U.S. 629, 639-640, 88 S.Ct. 1274, 1280-81, 20 L.Ed.2d 195 (1968); *New York v. Ferber*, 458 U.S. 747, 756-757, 102 S.Ct. 3348, 3354-55, 73 L.Ed2d 1113 (1982). The Government may serve this legitimate interest, but to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. May of Oradell*, 425 U.S. [610], at 620 [96 S.Ct. 1755, 1760, 48 L.Ed.2d 243]; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 686 [98 S.Ct. 1407, 1421, 55 L.Ed.2d 707] (1978)." *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980). It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Communications of California, Inc. v. FCC* 492 U.S. 115 at 126 (1989).

While one might be inclined to argue that the Respondents are not, in any way, advocating child's participation in pornography or obscenity, they are suggesting that Congress should presently ignore the fact that children are being given unfettered access to obscene pornography and other harmful materials. It has already been stated by this Court that, "as the mode of expression moves from the printed page to the commission of *public acts* which may themselves violate valid penal statutes, the scope of permissible state regulation significantly increases. [emphasis added]." *California v. LaRue*, 409 U.S. 109 (1972). The Internet is just one means by which a commercial venture can share harmful materials with a minor. The act is public by virtue of the fact that the Internet does not recognize state lines and can be omnipresent across all intrastate divides. *Reno, supra.*

Nevertheless, it is somehow suggested by Respondents that it . . . may even be a parent's fault if a child stumbles across the inviting hand of a pornographer, is taken by the hand, and shown material that has no proper place in the psyche of a child. Even though the individual provider is responsible for the content maintained on their own server, one is expected to believe that Web content providers should somehow be less responsible for what they do than would be any other participant in the marketplace of ideas.

One would think that it would be fair to state that all bear an equally narrow burden of acting responsibly with the speech that utters and distributes. Accordingly, it is valuable to recognize that this Court is as much a guardian of the rights of parents, as recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), as it is those of the rights of Web site providers. *Reno, supra. Amici Curiae* suggest to this Court that, since the family unit rests nearer to the core of this Nation's humanity than those interests which would create and distribute obscene materials, that any benefit of public policy doubt should be weighed in favor of Congress in this instance.



Oddly, only America's purveyors of Internet obscenity are allowed to completely blame the child or her parents for the fact that access was gained by a child. The purveyor is further allowed to extend his hand into this Nation's homes, libraries and schools and know that it is safe to do so since it cannot possibly know what "decency standard" applies in the geographical area of the child's computer access point. If Congress were to dare to define nationwide decency standards, Respondents would be unhappy as well. So long as nothing can satisfy Respondents in terms of reasonable accountability and a small price to pay for the freedoms of the First Amendment, America's children will have to continue being mentally molested. This can hardly be the law of this civilized and compassionate Nation.

### A. The Court Should Apply a Modified *Renton* Analysis to the Child Online Protection Act

As a matter of historical fact, it has been found time and again by municipalities and legislatures that publicly available sources of "adult" and obscene materials present with negative secondary effects on the public. E.g. *Erie v. Pap's A.M.*, 529 U.S. 277 (2000), *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). There is an established empirical connection between the materials being viewed at adult businesses and negative physical effects on surrounding communities. Such effects have been said to include increased violence against women, lewd conduct, prostitution, hostile work environments, increased sexual harassment and a whole host of other undesirable effects. Indeed, these effects have been attributable to *adult* viewing of such materials. One can reasonably surmise that the aftereffects of such materials being made available to minors can only be worse.

In addressing the concerns associated with other sources of obscene materials, state and federal courts have adopted what are known as "time, place, and manner" restrictions. Cf.

*Renton*, supra, *Erznoznik*, *supra* at 209. So long as the restriction is content-neutral, there is no constitutional infirmity in adopting such regulations. While not specifically content-neutral, the Child Online Protection Act is a narrowly tailored means of dealing with the direct and indirect (secondary) effects that online obscenity has on America's children and their parents. *See*, 47 U.S.C. § 231 note (Supp. IV 1998) (Finding 3). Simply stated, the regulation of the physical manner in which adults received their "protected" adult materials is not a form of censorship. The physical burden placed on Web site providers is *de minimis* when weighed against the primary and secondary harms sought to be curtailed.

COPA does not need to have the empirical evidence necessary to support its conclusions about the 'harmfulness' of certain First Amendment expressions. As pointed out by this Court in *Renton*, supra, a state need not resolve every empirical difficulty before it may legislate in an area concerning even the First Amendment. This is for the simple reason that the legislatures need broad power in order that they may carry out their necessary functions.

Along these lines, it is argued by Respondents that the reluctancy of adults to provide identification information to a Web site provider is an undue burden on the First Amendment. However, the reluctancy of adults who want sexually explicit materials hardly rises to the level of being a governmental restriction on protected speech. One would be hard pressed to claim that the reluctancy to provide information to a Web site provider could be any qualitatively worse than whatever reluctancy one might have to provide identification to a ticket booth at an adult theater or to the seller of adult materials. One would think that those who wish to indulge in adult content would be more than happy to substitute the private provision of age-identification from their homes than they would in having to make a public display of the identification process. America's children



should not be put at risk simply because an adult might have to make an intensely personal decision about whether they want a provider of adult content to have their identification information.

A user-based blocking system is, as a matter of common sense, not likely to be a pragmatically available solution to the problems presented by underage access to adult materials. *See*, 47 U.S.C. § 231 note (Supp. IV 1998) (Finding 4). One need not be a parent for long to understand that children often have a better grasp of modern technology than their parents. It is reasonable to assume that Congress intended to address this fact by placing the minor burden to protect minors on those who know the most about 'filtering' systems and the *time, place and manner* in which such technology can be used by Web providers. *Id.* It is simply unreasonable to place the burden on parents, libraries or schools since they are the least equipped to understand the technology necessary to assist the state in carrying out its compelling interest in protecting our Nation's children from established harms. *Id.*

### B. Parents Should Not be Forced to Bear the Entire Burden of Protecting Children on the Internet Frontier

Here, Respondents rely on the statement that, "Although it is difficult in today's society to constantly monitor the activities of children, it is still the right, and duty, of every parent to teach and mold children's concepts of good and bad, right and wrong. This right is no greater than in the confines of one's home. A family with values will supervise their children. This includes setting limits, and either being there to enforce those limits, or utilizing the available technology to do so. With such less restrictive means to monitor the online activities of children, the government need not restrict the right of free speech guaranteed to adults." *Cyberspace Communications, Inc. v. Engler*, 55 F.Supp.2d 737, 752-753 (E.D.Mich. 1999).

However, within the Internet, the proverbial foxes have been left with the keys to the chicken coop. While claiming that there is no way to regulate the Internet, the Respondents, and those interests that they represent, would have it that they cannot control the Internet, even though they *collectively* run it, yet place the same burden on parents. Moreover, Congress is not asking any individual to control the whole of the Internet. It is only asked that each commercial participant make some individual effort to protect children—with the obvious hope of a combined effect on the safety of children. Incredibly, COPA gave Respondents the benefit of the doubt by allowing them to avoid all community standards, other than their own, by using "reasonable" means to prevent minors' access to harmful materials. 47 U.S.C. § 231(c)(1)(C).

Nevertheless, Respondents seemingly confuse the nature of the societal protections involved in this case. While it is true that every adult who has to take additional steps to insure that minors do not gain access to "harmful" materials has a burden to bear, it is not true that this responsible burden is inconsistent with their own First Amendment rights. *See, U.S. v. Reidel, U.S. v. Thirty-Seven Photographs, supra.* Here, the fact that the geographic location of a minor can't be verified by a Web site operator is irrelevant to a duty to protect the child wherever they might be. The bottom line is that the Web site operator acts as a gatekeeper to all who access their site much in the same way that any store keeper might open and close their doors to certain customers.

While it is true that a Web site operator may never be able to stop all minors from accessing information, the same could be said of any barkeep who prevents minors from entering a drinking establishment, all liquor store owners who are required to inspect identification before selling alcohol, or even pornographers themselves who are required to insure that their 'actors' are of majority age. Again, placing focus on the location of a minor in cyberspace breeds a fundamental



misconception as to the access point to "harmful" materials. Respondents fallaciously assume that what is true of the Internet frontier as to its uncontrollable size and scope must also be true of the individual parts that make up the Internet. In logic this is a classic case of the fallacy of division. *See*, Dauer, Francis Watanabe, *Critical Thinking: An Introduction to Reasoning* (Oxford University Press, 1989) pp. 252-253; Hurley, John, *A Concise Introduction to Logic* (Wadsworth Publishing, 1997) pp. 170-172.

In reality, each Web site operator's server is but a small access point in cyberspace that is under the complete control of the individual operator in the same way that any storefront might be. COPA has apparently accounted for these common sense realities by providing affirmative defenses based on the notion that an individual operator need only use the most reasonable means available to control the access point to "harmful" materials. 47 U.S.C. § 231(c)(1). Quite graciously, Congress has made it such that a Web site operator can generate and use their own "reasonable measures" or those measures suggested by Congress after making findings of fact on the physical nature of the Internet. *Id.* This goes well beyond the requirement that Congress use narrowly tailored means to carry out its mission of protecting children.

## IV. COMMUNITY STANDARDS ARE NOT RESTRICTED BY THE LOCATION OF A MINOR

As indicated above, the location of a user is not so important as the fact that a Web site operator has absolute control over what can be accessed at the *individual* server or file level. *American Libraries Association v. Pataki*, 969 F. Supp. 160 at 166 (1996). This said, it is a burden to differentiate between the different applicable "community standards" that may apply in any given user's geographical area. However, this is not too significant a burden to place upon those who might distribute harmful, obscene or pornographic material. *Ginsberg v. New York*, 390 U.S. 629,

642-643 (1968). *See also*, *Hamling*, 418 U.S. 104-106 (1974). All laws impose a burden on those who might be affected by the People's voice.

Here, it might be wise to actually insist that the "community standards" test be applied in a conservative way to the Internet as it poses the greatest potential of quickly and effectively delivering harmful material to minors. Indeed, the risk to minors can be fully realized in a mere instant. *Pataki* at 167. The standards that apply to adult access to "obscene" materials cannot be properly applied to minors. *Ginsberg* at 638-639.

The First Amendment cannot be construed in such a way that one is completely able to shirk whatever obligation there may be to society in terms of protecting our children. E.g., *Ginsberg* at 360 U.S. 634-636. Moreover, Congress should not be forced to abstain from legislating against the powerful influence of the Internet on our children. "[T]he State . . . has an independent interest in the well-being of its youth." *Id.*, at 390 U.S. 640.

Knowing the above. Respondents nevertheless wish to place Congress in a false dilemma whereby it cannot leave discretion open to the Web site operator as with COPA *nor* too carefully define what is "harmful" for fear of having Respondents claim that there is overbreadth or content-based discrimination. (*Reno III* at 217 F.3d at 171-172). In short, it is apparent that Respondents simply don't want Congress to have any input as to how the Internet is operated even though it is a clearly identifiable element of intrastate commerce.

Having no standard cannot be the call of the day when the moral and spiritual lives of children are at risk. One can rest assured that Respondents would not be pleased if Congress arrogated to itself the right to specifically regulate each individual Web site operator's manner of doing business. Presumably, Respondents would be even more incensed if Congress were to adopt a nationwide licensing scheme. By



virtue of this case, Respondents have completely rebuked the notion of a national standard.

It is simply inconsistent for Respondents to complain of the fact that Congress has left them to their own devices in terms of insuring that they meet their civic obligation to protect children via respect for community standards. See, 47 U.S.C. § 231(c)(1)(C). First Amendment freedom on the Internet cannot be translated to mean that every Web site operator has free license to do whatever they wish. Freedom is not always an easy discipline and the Internet should not be used as a salvo for those who would shirk their duty to society.

Proper regulation can take place even if the initial impetus of the regulation has something to do with the content of the material sought to be distributed. Even with respect to content-based restrictions, this Court in *Ginsberg* restated the conclusion that, "We do not demand of legislatures 'scientifically certain criteria of legislation.' *Noble Bank v. Haskell*, 219 U.S. 104, 110." Accord, *Renton* at 475 U.S. 51 (as to content-neutral restrictions). With respect to community standards, it makes little sense to suggest that the same scientific 'gap-filler' used in *Renton* cannot be used to bridge the void between technology and community standards. It is simply unreasonable for Respondents to assume that a perfect model of First Amendment jurisprudence will be developed which can supplant the power vested in Congress and, thereby, deprive it of the ability to replace missing slats in the bridge between individual communities and the wild frontier of the Internet.

Lest America's children fall between the slats into a stormy sea of obscenity, pornography and violations of parental rights, it seems that Congress has served well in its capacity as a responsible guardian of rights and protector of America's children. As the source all building 'materials' for the omnipresent trestle of individual rights, the Constitution prevents this Court from acting as a demolition team where

Congress has acted responsibly. *See generally, Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803).

## CONCLUSION

For the foregoing reasons, the Honorable Court should reverse the judgment of the Third Circuit Court of Appeals herein.

Respectfully Submitted,

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